BRIEF IN SUPPORT.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 4801) is reported in 117 F. (2d) 110.

Jurisdiction.

The judgment of the Circuit Court of Appeals, affirming the conviction of the respondent, was entered January 18, 1941 (R. 4823), petitioner's application for a rehearing was denied on March 3, 1941 (R. 4860). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934,

Statute Involved.

Criminal Code Sec. 215, 18 U. S. C. Sec. 338, (R. S. Sec. 5480; Mar 2, 1889, C. 393, Sec. 1, 25 Stat.; 873; Mar 4, 1909, C. 321, Sec. 215, 35 Stat. 1130), reads in part as follows.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1000 or imprisoned not more than five years, or both."

Statement of Case.

The statement of case has been given in the petition, and in the interest of brevity, such statement is not repeated at this point.

Specification of Errors.

1. The Court below erred in refusing to charge the jury that advice of reputable counsel honestly accepted and acted upon was a defense in a mail fraud case, and charging in lieu thereof that innocent intent was no defense.

2. The Court below erred in holding that a scheme to bribe a public official, was a scheme to defraud within the meaning of the mail fraud statute, and at the same time refusing to instruct the jury as to the meaning of the legal term "bribery", or to inform the jury that a corrupt intent to influence the official action of the public official was an essential ingredient of the mail fraud statute.

3. The Court below erred in holding that the mail fraud statute embraced cases where money or property is obtained dishonestly by means of bribing a public official, when no lies or false pretenses, promises or representations are made.

4. The Court below erred in sanctioning the misconduct of the prosecuting attorney; thus depriving the defendants of a fair and impartial trial, and due process of law.

ARGUMENT.

Specification of Error No. 1.

Defense Based on Advice of Counsel—Innocent Intent.

The basis of the application for this writ under this heading is the failure of the Court of Appeals to follow the decision of this Court approving a charge on the subject of advice of counsel as a defense in a case involving a specific criminal intent.[3] In fact the Court of Appeals completely ignored the case although it was emphasized for their attention in both original brief, and on application for rehearing. The charge requested in this case was modeled

from the *Williamson* [3] case, although the Court of Appeals has refused to even mention it in its opinion. The charge given in the *Williamson* case [3] reads in part as follows:

> "* * * if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do * * * and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law."

That charge is in line with the decisions of other Circuit Courts of Appeal,[4] and of the state courts and law writers.[5]

At the trial, petitioner admitted all of the facts in the case; his only defense was innocent intent based on the contention that he employed the lawyer on a contingent basis to represent him in the bond transaction; the lawyer although a member of the Board without pay, had represented petitioner for many years. The government contended that the payment of this fee to this lawyer-member of the Board was bribery. Petitioner then proffered the following special charge;

> "A person has a legal right to act and rely upon the advice of a reputable attorney, if he received, acts and relies upon the advice in good faith. If you find that Miller's actions in this case were based upon his honest belief in the correctness of his attorney's advice, he would not be guilty because of any act based upon his

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[3] *Williamson* v. *U. S.*, 207 U. S. 425, 453.

[4] *U. S.* v. *Conner*, Fed. Cases No. 14,847; *U. S.* v. *Stanley*, Fed. Cases No. 16376; *U. S.* v. *Homestake Min. Co*, 117 Fed. 481; *Miller* v. *U. S.*, 277 Fed. 721; *Hersh* v. *U. S.*, 68 F. (2d) 799; *Levinson* v. *U. S.*, 263 Fed. 257; *Townsend* v. *U. S.*, 95 F. (2d) 352; *Murdock* v. *U. S.*, 62 F. (2d) 926; *Hays* v. *Stine*, 289 Fed. 224; *Lindsey* v. *Testa*, 200 Fed. 124.

[5] *People* v. *Powell*, 63 N. Y. R. 91; 22 C. J. S. verbo Criminal Law, Sec. 48.

> reliance in good faith upon that advice, even if such advice subsequently proved to be erroneous" (R. 2767).

Not only did the trial judge refuse this charge, but ignored petitioner's only theory of defense; refused to charge on the subject at all, and instead give the following grossly erroneous and prejudicial instruction to the jury;

> "You are instructed that it is no defense to a wrongful act knowingly and intentionally committed that the intent was innocent" (R. IV. 2756).

This is in direct conflict with the holding of this Court,[6] as well as the holdings of all of the Circuit Courts of Appeals[7] that innocent intent is a bar to conviction. So hopelessly incorrect and prejudicial was the qualification of the court's first statement that good faith was a defense as against the later modification that innocent intent was not a defense, that the Court of Appeals made no attempt to justify it, but merely left it out of the opinion as though the point was not in the case, although this petitioner laid great stress upon it. He argued that he had a legal defense, but was foreclosed in that defense by the court's failure to properly instruct the jury—thus depriving him of any jury trial on the only defense issue raised by him. If the jury believed that it was wrong for him to pay the board member a fee, they were constrained to convict him even though they believed that he did not intend to defraud, because they had been instructed that if he committed a wrongful act it was no defense that his intent was innocent.[8]

[6] *Durland* v. *U. S.*, 161 U. S. 306.

[7] *Rudd* v. *U. S.*, 173 Fed. 912; *Gold* v. *U. S.*, 36 F. (2d) 32; *Sandals* v. *U. S.*, 213 Fed. 575; *Harrison* v. *U. S*, 200 Fed 662; and authorities cited therein.

[8] Bishop on Criminal Law, 9th Ed. Sec. 85; 11 C. J. S., Sec. 2, Par. 2, p. 844; *People* v. *Sheffield, et als.*, 108 Cal. App. 721; *People* v. *Werner*, 84 Pac. (2d) 168; *York* v. *State*, 42 Ga. App. 453; *State* v. *Beattie*, 129 Me. 229; *Scott* v. *State*, 107 Ohio St. 475; *Allen* v. *State*, 72 Pac. (2d) 516 (Okla.); *State* v. *Hart*, 136 Wash. 278; *White* v. *State*, 103 Ala. 72; Bishop on Criminal Law, 9th. Ed., Sections 297 and 300.

Specification of Error No. 2.

Court's Failure To Instruct Jury Relative To Meaning of Term "Bribery".

The Court of Appeals held that in this case the statutory offense of bribery was an essential element of this mail fraud indictment. Bribery was charged in the indictment. The court read the indictment to the jury, but refused to give any charge that would enlighten the jury as to the legal meaning of the term "bribery".

Petitioner presented a charge on the subject, as follows:

> "I charge you, Gentlemen of the Jury, that you are not to infer from the fact that Mr. Miller paid part of his profits to Mr. Waguespack that he had an intent to bribe Mr. Waguespack if you find from the evidence that Mr. Miller believed that such a payment to Mr. Waguespack was lawful" (R. IV, 2768).

This was refused. The Court of Appeals has found that the crux of the case was the plan to bribe a public official, which was tantamount to a scheme to defraud, but the jury was never enlightened as to what bribery means in law; they were never told that the payment of money to a public official was not bribery unless accompanied by a corrupt intent. If a person charged directly with bribery is entitled to have the term "bribery" defined and the essential elements, including the element of corrupt intent, clearly explained to the jury by proper instructions, a fortiori is it necessary when bribery is made an element in a complicated mail fraud indictment, and the defendant seasonably presents special charges on an important theory of his case so that the jury may understand that theory and the essential rules of law applicable thereto.[9]

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[9] Zoline's Fed. Criminal Procedure, Vol. 1, Sec. 440 citing *Hendrey* v. *U. S.*, 233 Fed. 5; *Patterson* v. *U. S.*, 222 Fed. 599.

Here again the Court of Appeals merely left this important point out of its decision as though it was not raised, and refused to pass on the question.

Specification of Error No. 3.

All Dishonest Methods of Obtaining Property Not Embraced In Mail Fraud Statute.

The holding of the Court of Appeals that the dishonest method of obtaining an advantage by bribing a public official, where no lies are told, and where there are no false or fraudulent promises, pretenses or representations appears to extend the statute to the verge, and appears to petitioner to be in conflict with decisions of this Court,[9a] wherein this Court rejected the argument that the mail fraud statute embraced all dishonest methods of obtaining property. Congress has not said that the deprivation of persons of property by means of bribery shall constitute a violation of the mail fraud statute, and as criminal statutes must be strictly construed, and as this Court has said,[10]

> "* * * it is not for the courts, in the absence of such legislation to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. * * *"

Specification of Error No. 4.

Misconduct of Prosecuting Attorney Depriving Petitioner of Fair Trial and Due Process of Law.

This court in reversing a conviction because of the misconduct of the prosecuting attorney said [11] in speaking of the prosecuting attorney that;

> "But while he may strike hard blows, he may not strike foul ones. It is as much his duty to refrain from

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[9a] *Fasulo* v. *U. S.*, 272 U. S. 624.
[10] *U. S.* v. *Gradwell*, 243 U. S. 383.
[11] *Berger* v. *U. S.*, 295 U. S. 78.

> improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. * * * improper suggestions, insinuations and, especially, asertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

This case is a much more aggravated one than the *Berger* case for not only did the prosecuting attorney express his personal belief in the guilt of petitioner (R. V. 8, p. 4703) and when objection was made the judge told the jury that the attorneys should not inject their personal views in the case because it was not evidence he stated that,

> "The government is prosecuting the case, and the Assistant Attorney-General is before you. You may draw your own inference from that * * *" (R. V. 8, p. 4703).

Meaning, of course, that the jury could infer that the Assistant Attorney-General believes petitioner was guilty or the Government would not be prosecuting the case, nor would the Assistant Attorney-General be before the jury if he did not believe petitioner was guilty. That which could not have been done directly was done indirectly. Many other instances of prejudicial, inflammatory and improper arguments were made.

But the prejudice extends further and we need only quote from the opinion of the Court of Appeals to point it out (Op. p. 116, R. 4808).

> "We have merely sketched what was indeed an *extraordinary situation.* * * * We think that the prosecuting attorney's encouragement of the newspaper publicity about the case *was ill-judged, and improper.* * * * The newspapers here sometimes went too far, and the *prosecuting attorney* ought not to have *contributed to* what became an *abuse.*" (Italics supplied.)

Other defendants will elaborate on this point, and in the interest of brevity we will content ourselves with pointing it out, as we believe this to be a case which should be scrutinized by this Court in view of the conduct of the prosecuting attorney who kept up a constant campaign of statements to the press relative to this case in the midst of one of the bitterest political campaigns in the history of the State, and this case was an important issue in the campaign.

The defendants did everything they could to try to protect their rights. They filed several petitions prior to the trial to punish the newspapers; they requested a continuance until the inflamed public atmosphere cleared after the election, but the District Judge refused to grant petitioner any relief.

The case is, therefore, immeasurably more aggravated than the *Berger* case, *supra,* because the prosecuting attorney in this case began his misconduct months before the trial by contributing to the newspaper's inflammatory campaign against the defendants; coerced the prospective jurors by making public statements relative to an investigation by the grand jury of jury fixing in connection with a trial of one of the defendants in this case, and in general stirred up a condition of prejudice in the minds of the public against them for the purpose of setting a proper atmosphere for the trial of petitioner.

The 6th Amendment of the Constitution of the United States provides that,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *."

The 5th Amendment provides, that the defendants shall not

> "* * * be deprived of life, liberty or property, without due process of law."

Petitioner has not received such a trial as was contemplated by the 6th Amendment, nor has he received due process within the meaning of the 5th Amendment.

Conclusion.

We respectfully submit that this petition for a writ of certiorari should be granted.

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